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No. 94-1708

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NLFC, INC.,

Petitioner,

v.

DEVCOM MID-AMERICA, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case solely involves the interpretation of two license agreements, as both lower courts found and despite NLFC's rhetoric. Devcom[1] strongly objects to NLFC's presentation of the Questions Presented for that reason and also for the reason that it terribly misstates the record in this case.

The unqualified statement that "Devcom printed on its own computers the source code of [the] NLFC software" is wholly untrue, is directly contradicted by Devcom's uncontroverted evidence and has no factual support whatsoever as the Seventh Circuit found. Moreover, NLFC totally misstates the Seventh Circuit's opinion. The Seventh Circuit held that NLFC failed to show any evidence of "copying" and that even if Devcom had engaged in "copying" this was specifically permitted by the two license agreements in issue.

NLFC has not even questioned the holding of the Seventh Circuit. If it had, the questions presented would have been as follows:

> 1. Was the decision of the Court of Appeals that NLFC failed to create a genuine issue of material fact as to whether Devcom had ever copied the NLFC software onto its in-house computer system and had ever illegally marketed any NLFC software (NLFC's sole contentions before the Court of Appeals) fully supported by the undisputed facts of this case?
>
> 2. Was the decision of the Court of Appeals that even if Devcom had copied the NLFC software onto its in-house computer the same was fully authorized under its two license agreements as a matter of law?

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[1] Devcom has no parent companies or subsidiaries within the meaning of Supreme Court Rule 29.1.

Since NLFC has not questioned the Seventh Circuit's holding, the above questions will only be considered in passing. Moreover, in view of that fact the only questions presented in its Petition are as follows:

1. Should NLFC be permitted to use the Petition to raise for the first time an issue that was never raised below and that therefore neither the District Court, the Court of Appeals nor Devcom ever considered?

2. Was the Court of Appeals correct in finding that N.D.Ill. Local Rule 12(n) is wholly consistent with Fed.R.Civ.P. 56 and that those portions of NLFC's 12(n) Statement which consisted merely of conclusions and mischaracterizations of the record could not be considered?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Devcom Mid-America, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by NLFC, Inc.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

17 U.S.C.A. § 117:

Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided: (1) that such a new copy or adaptation is created as an essential

step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner. . .

Fed.R.Civ.P. 56(e):

. . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

This case involves the interpretation of two licensing agreements entered into by NLFC's predecessor-in-interest, Lab Force, Inc. ("Lab"): (1) the license agreement between Lab and Cabrini Medical Center ("Cabrini") and (2) the license agreement between Lab and Franciscan Shared Laboratory ("FSL"). Lab is the alleged copyright holder of certain software used in the hospital community.

As NLFC admitted in its brief before the Seventh Circuit, these license agreements gave Cabrini and FSL the contractual authority to (i) modify and enhance their Lab software so as to make it operational, (ii) make copies of the Lab software for such purposes and (iii) use third parties, such as Devcom, to perform the modifications and enhancements.

Pursuant to this authority, Devcom obtained a viewable print-out of the Lab software for the purposes of remov-

ing "time-bombs"[2] from and debugging, modifying and enhancing Lab's software for Cabrini and FSL. This was done to enable these hospital centers to protect the lives of thousands of innocent patients when NLFC was unable or unwilling to do so.

While Devcom necessarily had to view the Lab software to do its debugging operations, all Devcom ever printed out at its offices were its own proprietary modification logs and not any Lab software at all. Those modification logs were printed on a dedicated dumb terminal linked to Cabrini and FSL's computers by telephone, not from Devcom's own computer.

NLFC filed its initial complaint against Devcom alleging that Devcom had modified its software, made copies of the same and then marketed the modified software. This complaint, containing allegations solely based on information and belief, was dismissed by the District Court for that reason. An amended complaint ("Complaint") deleting all references to information and belief but otherwise word for word the initial complaint, was then filed. Devcom's motion for summary judgment was filed shortly thereafter.

On November 16, 1993, the Magistrate Judge recommended that Devcom's motion for summary judgment on the copyright infringement portion of NLFC's Complaint be granted, finding that the license agreements permitted Devcom to debug the Lab software and that Devcom never marketed any modified software. He also recommended that the state law counts of the Complaint be dismissed.

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[2] Internal programs installed by Lab which illegally rendered its software wholly inoperable at preset times thus endangering the lives of patients. NLFC Appendix, at 23.

On January 4, 1994, the District Court adopted the recommendations of the Magistrate Judge, finding that as a matter of law Devcom's use of the Lab software was within the licenses granted by Lab.

On appeal to the Seventh Circuit, NLFC claimed only that Devcom had "copied the NLFC software onto its in-house computer system" and "illegally marketed the NLFC software as modified." On January 19, 1995, the Seventh Circuit found that the purported evidence of such activities was not supported by the record and that even if such activities had occurred they were permitted by the terms of the licenses. It then affirmed the District Court's ruling on all counts of the Complaint.

In its Petition, NLFC for the first time in this litigation raises a new theory of copyright infringement. It alleges that Devcom printed NLFC's source code via a telephone line linking its Chicago-based printer to Cabrini's New York-based computer and that this conduct violates the Copyright Act (17 U.S.C.A. § 101 et seq.). NLFC has not sought review of the claims it brought before either the District Court or the Seventh Circuit and alleges no damages from Devcom's purported actions.

SUMMARY OF ARGUMENT

NLFC has not presented anything meeting the character of Supreme Court Rule 10's special and important reasons that this Court considers in acting on a Petition for a Writ of Certiorari.

NLFC's eleventh hour and sole argument is that Devcom printed NLFC's source code using a telephone line and that this printing was unauthorized. This argument is not supported by its Complaint, was never made to either the District Court or the Seventh Circuit, was never considered below and is factually incorrect.

With regard to this eleventh hour argument, it is uncontested that Devcom, after being approached and retained by Cabrini and FSL, printed "something" using a telephone line, more exactly a telephone line linking Devcom's printer to Cabrini's computer. But that "something" was merely Devcom's own proprietary modification log.

Moreover, the license agreements are determinative. Even if NLFC source code had been so printed, such printing was fully authorized by those very agreements. The license agreements specifically and unequivocally permitted Cabrini and FSL to (i) modify and enhance the Lab software, (ii) make a copy of the Lab software for such purposes and (iii) utilize third parties to perform such services, all as found below.

N.D.Ill. Local Rule 12(n) is fully consistent with Fed.R. Civ.P. 56, more precisely Fed.R.Civ.P. 56(e).

REASONS FOR DENYING THE WRIT

I.

AS A MATTER OF LAW THE PETITION SHOULD BE DENIED

For several reasons the Petition should be denied.

A. NLFC Raises None Of The Criteria Under Supreme Court Rule 10

Supreme Court Rule 10 sets forth the character of the reasons under which a Petition are to be considered. NLFC does not contend that it meets any of them. There is no conflict with decisions of any court of appeals or this Court regarding either the Copyright Act or the standards for summary judgment.

All NLFC suggests is the "broad implications . . . for the software industry." But this case presents no such implications. It simply requires reading and interpreting two unambiguous license agreements.

B. The Issue Raised In The Petition Has Nothing To Do With NLFC's Complaint

NLFC's Amended Complaint in this case alleges solely that Devcom modified Lab software, made copies of that modified software and then marketed and sold the copies. NLFC Appendix, at 19, 31. The issue raised in the Petition has nothing to do with these allegations, even under the liberal pleading provisions of the Federal Rules of Civil Procedure.

All NLFC alleges in the Petition is that Devcom printed NLFC's source code via a telephone line. No issue is raised as to any modifications having been made or of any efforts to market those modifications.

C. NLFC's Sole Issue Concerns A Matter Never Argued Before The District Court or Seventh Circuit

As shown, NLFC's latest and sole argument is that Devcom printed NLFC's source code via a telephone line and that this printing was unauthorized.

This argument was never made below.

The sole argument to the Seventh Circuit was that Devcom had "copied the NLFC software onto its in-house computer system"[3] and "illegally marketed the NLFC software as modified." NLFC Appendix, at 6. Neither argument is made to this Court notwithstanding the oblique references noted in n.3, supra.

In light of NLFC's eleventh hour position, Devcom is apparently forced to address this position even though (1) it was never called upon to do so before, (2) the lower courts never considered it and (3) thus the lower courts never ruled upon it.

It will do so merely to show that NLFC's latest position is wholly without merit and even though NLFC's actions are so fundamentally in error that the Petition should be denied on that basis alone. *E.E.O.C. v. Federal Labor Relations Authority*, 490 U.S. 19 (1986), citing *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983) and *Rogers v. Lodge*, 458 U.S. 613 (1982).

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[3] NLFC's statements that "Devcom printed on its own computers the source code of [the] NLFC software" (page ii) and "[Devcom] maintain[ed] a copy on [its] third party's computer" (page 14) are neither true nor supported yet exemplifies NLFC's mischaracterizations of the record as both the District Court and Seventh Circuit found. NLFC Appendix, at 5, 21.

II.

THE STANDARDS FOR SUMMARY JUDGMENT

The standards for summary judgment are fully described in the Seventh Circuit's opinion.

In addition, in *Celotex v. Catrett*, 477 U.S. 317, 322-323, 325 (1986) this Court stated that:

> "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. . . [T]he burden is [not] on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact . . . the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case."[4]

A dispute about a material fact is genuine within the meaning of Rule 56 only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party . . . [and] the mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986).

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[4] No further citation is required to negate the so-called standards under Rule 56 proffered by NLFC on page 10 of the Petition.

III.

NLFC DID NOT MEET ITS BURDEN TO SHOW THAT DEVCOM MADE A COPY OF ITS SOURCE CODE AND EVEN IF IT HAD SUCH COPYING WAS SPECIFICALLY PERMITTED BY THE LICENSE AGREEMENTS AND THE COPYRIGHT ACT

Since NLFC would bear the burden at trial of showing copyright infringement, that same burden applies on a motion for summary judgment. *Celotex*, supra.

A. All NLFC Showed was that Devcom Had Printed Devcom's Own Proprietary Modification Logs

NLFC supplied below one page of the Jon Kristofferson deposition testimony. That deposition refers to "Exhibit 1."

But Exhibit 1 (the second piece of "evidence" submitted to the lower court but mysteriously omitted from NLFC's Appendix) is merely Devcom's own proprietary modification log to the Lab software (containing for identification purposes the name of Lab Force, Inc. on its face). It is a four page document, in comparison to NLFC's source code which was hundreds of pages in length, and contains, inter alia, the following notations (lqk is a reference to Larry Koranda, the Devcom employee who did the debugging):

> "DEVCOM. lqk"
>
> "Modification Log"
>
> "07-02-91 RBE DEVCOM. Added semaphore calls for new transit phantom"
>
> "02-01-91. lqk. Set error diagnostics"
>
> "11.8.90 CFA at DEVCOM"
>
> "COMIRESULTS—DEVCOM COM1 RESULTSX4"
>
> "Open up the sleep time a bit to give the CPU a rest!"

Moreover, NLFC never supplied anything, let alone an affidavit, to contradict that Exhibit 1 was anything more than Devcom's own modification log. Since NLFC's eleventh hour position was never before the lower courts, the Seventh Circuit harmlessly assumed that this exhibit was actually NLFC source code even though it is uncontested that it was not.

One does not violate the Copyright Act by printing its own proprietary work.

B. Even if Devcom Had Copied Source Code, it was Fully Authorized to do so by the License Agreements and The Copyright Act

As shown, NLFC presented no summary judgment evidence to show that Devcom had copied its source code.

As Jon Kristofferson testified in his deposition:

> Q. "Did you ever make a copy of any NLFC software or any Lab Force software?
>
> A. "No.
>
> . . .
>
> Q. "To your knowledge, did anyone at Devcom ever make a copy of any Lab Force or NLFC software?
>
> A. "No."

Devcom supplied affidavits, deposition testimony and its Local Rule 12(m) Statement that it never had any copy of Lab software except as necessarily required for debugging purposes and that it never made a copy of any Lab software. Devcom also supplied the undisputed affidavits of three experts that it was impossible to debug the Lab software without seeing it in hard copy, an obvious conclusion due to its enormous complexity. And it is uncontested that Devcom serviced FSL and Cabrini solely

through on-site visits, telephone lines and dedicated telephone lines linked to Devcom's dumb terminal.[5]

But even if Devcom had made copies of the Lab software it was fully authorized to do so under the license agreements.

In its brief before the Seventh Circuit, NLFC finally admitted that FSL and Cabrini had the contractual authority to (i) modify and enhance the Lab software in their possession, (ii) make copies of the Lab software for such purposes and (iii) use third parties, such as Devcom, to perform the modifications and enhancements to the Lab software in their possession.

NLFC should never have maintained otherwise: it always had a copy of the two licenses in its possession, even though it attempted to keep these documents from Devcom in the face of Devcom's discovery requests.[6] Devcom ultimately had to obtain them directly from Cabrini and FSL.

Section 6 of the FSL license agreement (somehow ignored by NLFC in the Petition) specifically stated that

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[5] NLFC's statement on page 11 of the Petition that the "[Seventh Circuit] *inferred* that . . . Devcom had used telephone lines" is incorrect. Devcom's Local Rule 12(m) Statement and its numerous uncontested affidavits left nothing for anyone to "infer," particularly when NLFC submitted not one affidavit in this litigation let alone one contradicting Devcom's submissions. See, also, NLFC Appendix, at 25, n.12.

[6] In response to Devcom's request for "all license agreements, amendments thereto, and cancellations thereof, between either NLFC or Lab Force and its customers" NLFC stated as follows: "NLFC objects that Lab Force is not a party to this lawsuit and therefore cannot produce or object to production of its documents. NLFC objects to this request as it is too broad in scope, is vague, burdensome and propounded solely for the purpose of harassing NLFC. . ."

"FSL may obtain maintenance and support services from whatever source FSL deems necessary." Section 7 stated that "FSL agrees to keep all Lab Force Software and documentation confidential and not make any disclosures to third parties, with the exception of disclosures made pursuant to FSL's rights under this letter agreement."

Section 6.2 of the Cabrini license agreement provided for the "License of Lab Force Software" and specifically permitted Cabrini (i) "to copy [the Lab software] . . . as reasonably necessary for licensed use. . ." (§ 6.2.2) and (ii) to "modify any of the [software], integrate it into other program material or form an updated work" (§ 6.2.4). Paragraph 6.2.5 specifically made Cabrini "exclusively responsible for the supervision, management and control of its use of [the Lab software] to and through its agents and employees." Paragraph 6.2.7 also reflected that Lab gave Cabrini "copies of the source code" and permitted Cabrini "to use the foregoing for purposes of modification, maintenance, enhancement and integration. . ." Paragraph 8.4 reflected Cabrini's authority to disclose the software to third parties.

As stated by NLFC in its brief below (now contradicted at pages 7, 13 and 14 of the Petition):

> "The NLFC license agreements with FSL and Cabrini granted them authority to make copies of NLFC software. . ."
>
> "FSL was allowed to disclose the software source code to third parties for maintenance and support services. . ."
>
> "Whoever maintains NLFC's copyrighted software may view the software. . ."
>
> "The specific license agreements of NLFC's customers, FSL and Cabrini, permit these licensees to make reasonable copies of the NLFC copyrighted software for backup and maintenance."

> "The magistrate concluded that NLFC's license agreement with Cabrini authorized a third party such as Devcom to modify and enhance the NLFC software in the possession of Cabrini."

This case involves nothing more than reading and interpreting the two license agreements. See, also, NLFC Appendix, at 36, regarding acknowledgments made in NLFC's Local Rule 12(n) Statement.

Moreover, in view of the unambiguous terms of the license agreements no violation of the Copyright Act would have resulted even if Devcom had printed NLFC's source code.

First, it is only copying beyond the scope of a license that is prohibited and only unauthorized copying is proscribed. See, *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517 (9th Cir. 1993) ("to prevail on a claim of copyright infringement, a plaintiff must prove ownership of a copyright and a copying of protectable expression *beyond the scope of a license*") (emphasis added); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 (9th Cir. 1989) and *ISC-Bunker Ramo Corp. v. Altech, Inc.*, 765 F.Supp. 1310 (N.D.Ill. 1990) (unauthorized and unlawful possession, copying and distribution).

Even if Devcom had printed a copy of Lab's software it would have done so solely to provide debugging, modification and enhancement services pursuant to Lab's explicit authorization.

Second, Section 117 of the Copyright Act also shows that Devcom had clear authority to copy the Lab software even though it never did so.

Section 117 states in pertinent part as follows:

> "Notwithstanding the provisions of section 106, it is not an infringement for *the owner of a copy of a com-*

> *puter program* to make *or authorize the making of another copy or adaptation of that computer program* provided: (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner. . ." (emphasis added)

Courts have interpreted Section 117 according to its literal language. In *Foresight Resources Corp. v. Pfortmiller*, 719 F.Supp. 1006 (D.Kan. 1989) the defendant enhanced the plaintiff's program for the owner of a copy of the software. The plaintiff sought to enjoin such activities. The injunction was denied. See, also, *S.O.S.*, supra, at 1089 n.9.

Section 6.1.1 of the Lab/Cabrini license agreement states in pertinent part as follows:

> ". . . PURCHASER [Cabrini] *shall own all copies of the COMPUTER SOFTWARE provided to PURCHASER* under this Agreement and all copies made by PURCHASER pursuant to Paragraph 6.2.2. . ." (emphasis added).[7]

Since Cabrini was the owner of the copy of the Lab software it received from Lab, it had the unfettered right to "authorize the making of another copy or adaptation." Hence, even if Devcom printed a copy of NLFC's source code, it did so with the authority of Cabrini to permit Cabrini to utilize Lab's software in conjunction with its computer. Devcom did not require NLFC's approval.

As stated by NLFC in its brief to the Seventh Circuit:

> "Such copies may be made only if they are necessary as an essential step in utilizing the software but must

[7] Magistrate Judge Guzman did not focus on this section of the agreement, focusing only on Cabrini's status as a licensee. NLFC Appendix, at 37.

> be no more necessary than is reasonably necessary. . . In-house adaption is allowed under Section 117, provided they are not designed for widespread marketing."

Devcom could not agree more fully. Devcom never "exploited" anyone as NLFC suggests.

IV.

UNDER BASIC TENETS OF AGENCY LAW, EVEN IF DEVCOM HAD PRINTED NLFC SOURCE CODE IT HAD THE FULL RIGHT TO DO SO

Assuming that the two license agreements were not so specific and the law not so clear, the issue before this Court would be straightforward:

> If a copyright owner specifically authorizes a licensee to make a copy of its software for the purpose of debugging, modification and enhancement, can the licensee's duly appointed agent obtain or make such a copy solely and exclusively for the same limited purposes?

While this issue is another common law basis of Devcom's defense and one of the bases of the District Court's decision, it is totally ignored by NLFC.

Hornbook agency law supplies the obvious answer: a corporation can act only through its employees and agents and the authority of a corporate-principal can be exercised directly or through its agents. See, e.g., *Freeport Journal-Standard Pub. Co. v. Frederic W. Ziv. Co.*, 345 Ill.App. 337, 103 N.E.2d 153 (2d Dist. 1952); *Cnota v. Palatine Area Football Ass'n*, 227 Ill. App.3d 640, 592 N.E.2d 196 (1st Dist. 1992); *Clapp v. JMK/Skewer, Inc.*, 137 Ill.App.3d 469, 484 N.E.2d 918 (3d Dist. 1985); *United States v. Chicago Exp. Inc.*, 273 F.2d 751 (7th Cir. 1959) and *Marbro Foods, Inc. v. United States*, 293 F.Supp. 754 (E.D.Ill. 1968).

The uncontroverted facts are as follows:

1. Lab specifically authorized FSL and Cabrini to make copies of its software for the purposes of modification and enhancement.

2. Devcom was retained by FSL and Cabrini as permitted by Lab to remove time-bombs and to perform debugging, modification and enhancement services.

3. Devcom obtained a single viewable print-out of certain Lab software from FSL and Cabrini in order to perform such services.

The conclusion is inescapable: Devcom using a copy of certain Lab software that it obtained from FSL and Cabrini, and then solely as agent for these medical centers, performed the very services Lab agreed that they could obtain.

The hornbook law of agency as well as the specific provisions of the two licenses are precisely on point.

V.

THERE IS NO INCONSISTENCY BETWEEN RULE 56 AND LOCAL RULE 12(n) AND THE LOWER COURT CORRECTLY IGNORED NLFC'S 12(n) STATEMENT

In arguing that this Court should void N.D.Ill. Local Rule 12(n), NLFC has ignored (in citing only Rule 53(c)) as well as fundamentally failed to understand Rule 56(e). There is not the least inconsistency with Rule 56(e) and Local Rule 12(n). See, *Celotex*, supra. Under Rule 56(e), a party in the face of affidavits on a motion for summary judgment is not permitted to rely on mere allegations. As provided by Rule 56(e):

> ". . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise pro-

> vided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

See, also, *Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254 (7th Cir. 1990). Local Rule 12(n) merely reiterates the principles of Rule 56(e).

The instant case is not one where summary judgment was entered by default as NLFC suggests. NLFC timely filed its response to Devcom's motion for summary judgment and served Devcom with the same. Also, both the District Court and the Seventh Circuit analyzed the two pieces of evidence and the arguments NLFC propounded. The two cases NLFC cites, *Henry v. Gill Industries, Inc.*, 983 F.2d 943 (9th Cir. 1993) (failure to timely serve papers opposing summary judgment motion) and *Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima*, 776 F.2d 1277 (5th Cir. 1985) (failure to timely file responsive pleadings), are totally irrelevant.

Also, NLFC's statement (Petition, at 16) that "local rule 12(m) allows the . . . district court to grant summary judgment based on the bare allegations contained in a rule 12(m) statement, regardless of . . . the record" is patently not true. By its terms Local Rule 12(m) states that the 12(m) statement "shall consist of short numbered paragraphs, *including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph* (emphasis added)." (Petition, at 5).

This is precisely what Devcom's 12(m) Statement did. Local Rule 12(m) does not permit "bare allegations" as NLFC suggests to this Court. And it does not supplant

the role of "admissions" under the Federal Rules, merely allowing references to admissions to be included within a 12(m) statement.

One need only read page 5 of NLFC's own Petition to understand Local Rule 12(m). NLFC apparently failed to do so.

Finally, to support its conclusion that its 12(n) Statement should not have been rejected, NLFC quotes only one paragraph of the 35 paragraphs in its 12(n) Statement. But even this paragraph lends no support to NLFC's eleventh hour position and is itself a pure legal conclusion that totally mischaracterizes Kristofferson's testimony. The 12(n) Statement had nothing to do with a "statement of material facts" as NLFC's failure to provide this Court implies and as the lower courts found. See, e.g., NLFC Appendix, at 24, 31-32. Perhaps in reply NLFC will include the entirety of its 12(n) Statement for this Court's benefit.

NLFC's Local Rule 12(n) Statement was properly ignored below. Devcom's assertions in its Rule 12(m) Statement, fully supported by record references, were properly deemed admitted and uncontested. See, *Valenti v. Qualex, Inc.*, 970 F.2d 363 (7th Cir. 1992); *Knox v. McGinnis*, 998 F.2d 1405 (7th Cir. 1993); *MacDonald v. Commonwealth Edison Serv. Annuity Fund*, 810 F.Supp. 239 (N.D.Ill. 1993); *ARDC v. Betts*, 149 Bankr. 891 (Bankr.N.D.Ill. 1993) and *Appley v. West*, 929 F.2d 1176 (7th Cir. 1991).

But even if NLFC's 12(n) Statement could somehow have been considered, there was no error. The record is clear that the two pieces of evidence submitted by NLFC (even though Devcom supplied some 20,000 pages of documents in discovery) were all fully considered below.

CONCLUSION

This case has nothing to do with "broad implications . . . for the software industry," even if that standard is appropriate for consideration by this Court. It involves simply interpreting two contracts that Lab itself drafted and then executed.

Devcom prays that this Court deny NLFC's Petition for Writ of Certiorari because the case presents no issues appropriate for this Court's review and because the lower courts' holdings, never addressed in the Petition, were not in error.

Respectfully submitted,

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